

House Financial Services Committee Puts Spotlight on Cannabis Banking Restrictions

February 19, 2019

Barely a month after Democrats took over the House Financial Services Committee (“HFSC”) gavel, lawmakers heard testimony on February 13, 2019 about a bill that would lift federal barriers to providing financial services to the cannabis industry—the Secure and Fair Enforcement Banking Act of 2019 (the “SAFE Banking Act”). This marked the first-ever Congressional hearing on legislation that would ease restrictions on cannabis-related activity and underscores significant interest on Capitol Hill in

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addressing issues that result from the current rift between federal and state drug laws. Although a major shift in federal law and policy—including full legalization of cannabis—may not be in the immediate offing, the hearing suggests that a bipartisan consensus may be taking shape to give greater certainty to financial institutions as they consider providing services to the cannabis industry.

This Debevoise Update summarizes the SAFE Banking Act, highlights testimony from the HFSC’s February 13 hearing to consider it, and describes other pending or proposed cannabis-related legislation. Three key themes emerge:

- Odds appear better that Congress will address challenges facing the cannabis industry (and businesses, including banks, providing services to it) through incremental steps as opposed to broad, sweeping action. Bipartisan agreement to make fundamental changes to current law, including legalizing cannabis at the federal level, remains elusive.
- Support for the SAFE Banking Act is more about addressing the public safety risks of a booming cannabis industry that cannot access the regulated banking system, and providing legal certainty to depository institutions, than about helping cannabis businesses themselves.
- As the SAFE Banking Act moves through the legislative process, its provisions are in flux. Substantial uncertainty remains about whether, and in what form, the bill may pass.

BACKGROUND ON THE SAFE BANKING ACT¹

Representative Ed Perlmutter (D-CO) first introduced the SAFE Banking Act in 2017 and it has continued to evolve since. In its present form, the bill would prevent federal banking regulators from taking the following actions in states which have legalized cannabis: (i) terminating deposit insurance for a bank solely because it has provided financial services to a cannabis-related business; (ii) imposing restrictions or penalties on depository institutions for providing financial services to cannabis-related businesses; (iii) discouraging institutions from offering financial services to individuals or entities because they are involved in the cannabis industry; and (iv) otherwise taking adverse supervisory action with respect to cannabis-related lending activity.

It also would revise federal anti-money laundering statutes to clarify that funds derived from transactions involving a cannabis-related business in a state that has legalized cannabis do not constitute proceeds of an unlawful activity solely because of the business's involvement, a change that would provide relief to all financial institutions, including broker-dealers, that are subject to the Bank Secrecy Act and its suspicious activity reporting ("SAR") requirements. The bill would further protect banks and their employees by: shielding them from federal criminal liability for providing financial services to lawful cannabis-related businesses; and removing the risk that collateral could be subject to forfeiture under federal law when banks provide loans to people or companies involved in the cannabis industry.

As a supervisory matter, the SAFE Banking Act would better coordinate oversight of the cannabis industry by giving the Financial Crimes Enforcement Network ("FinCEN") power to promulgate SAR guidance to financial institutions operating in the cannabis industry. It also directs the Federal Financial Institutions Examination Council to develop uniform guidelines for examining depository institutions that provide financial services to legitimate cannabis-related businesses, which should give banks more certainty in operating such programs.

KEY TAKEAWAYS FROM THE HFSC HEARING

Notwithstanding ideological differences among members of the Committee, the SAFE Banking Act appears to enjoy support across the political spectrum. This bipartisan consensus derives in substantial part from concern about the public safety risks from current arrangements that require cannabis businesses to operate almost entirely in cash.

¹ More information about the hearing and a copy of the SAFE Banking Act is available [here](#).

Several members and witnesses shared anecdotes about people injured or killed in armed robberies of cannabis dispensaries, which often hold large amounts of cash on premises because they cannot find banks to accept their deposits. Illustrating the magnitude of the problem, an employee of one of the few credit unions that takes deposits from the cannabis industry testified that her institution took in \$529 million in cash from cannabis businesses in 2017 and 2018 alone. Absent a legislative fix, many lawmakers expressed concern about the amounts of cash that will continue to circulate among these businesses.

Violent crime is not the only risk this cash-based system presents. One witness, California State Treasurer Fiona Ma, explained that taxing authorities are hard-pressed to monitor cash-intensive businesses and, as a result, the risk of tax evasion will remain significantly elevated until cannabis businesses can access the regulated banking system.

The HFSC also focused on operational and other difficulties cannabis businesses face because they cannot use traditional banks. For instance, critical service providers such as equipment suppliers and power companies are reluctant to serve cannabis businesses, even though their activities are entirely lawful in the states where they operate. There are consequences to individuals working in the industry as well. A witness who owns several Washington D.C. medical cannabis dispensaries, Corey Barnette, explained that he must pay his employees in cash, and that these workers have difficulty accessing credit or even renting homes because of their source of income.

In something of a surprise, witnesses on the whole reported being comfortable with the current SAR filing system and FinCEN guidance. The Chief Risk Officer of an Oregon credit union and the CEO of a Washington community bank both argued that any federal legislation that is ultimately passed should not substantively alter SAR filing requirements; however, several Committee members noted that regulators should be involved with drafting the legislation to ensure integration with the existing anti-money laundering framework.

Among members who oppose cannabis legalization, there was disagreement as to whether the SAFE Banking Act charts the appropriate course. Some asserted that adding new laws to the legal framework without comprehensively addressing the issue by de-scheduling cannabis, or removing it from the Controlled Substances Act (“CSA”), would merely sow further confusion in the industry. Meanwhile, Representative Andy Barr (R-KY) pointed to the 2018 Farm Bill as a model for how Congress could address cannabis legalization in this way. Still other members noted that full-scale legalization might be politically difficult to achieve.

OTHER PROPOSED LEGISLATION

Although the HFSC considered only the SAFE Banking Act on February 13, several other cannabis-related bills, including some that were introduced in prior years but have not yet been re-filed during this legislative session, are widely expected to be considered in this Congress:

- **S.3032: Strengthening the Tenth Amendment Through Entrustment of States (“STATES”) Act.** Although not yet formally introduced into the current Congressional session, many commentators see it as a runner-up to the SAFE Banking Act in terms of likelihood of enactment. Originally introduced in 2018 by Senators Cory Gardner (R-CO) and Elizabeth Warren (D-MA), it would amend the CSA to exempt its application “to any person acting in compliance with state law relating to the manufacture, production, possession, distribution, dispensation, administration, or delivery of marihuana.” It would, however, establish a floor for state law by continuing application of the CSA to persons who hire people under 18 years of age in the cannabis industry and to persons who distribute cannabis to those under age 21.
- **H.R. 420: Regulate Marijuana Like Alcohol Act.** This bill was filed by Representative Earl Blumenauer (D-OR), a longtime supporter of easing federal restrictions on cannabis. It would transfer cannabis enforcement authority from the Drug Enforcement Administration to a renamed Bureau of Alcohol, Tobacco, Marijuana, Firearms and Explosives, remove cannabis from the CSA, and authorize federal permits for cultivating, packaging, selling, and importing cannabis. It would, however, prohibit shipping or transporting cannabis into states that have not legalized it.
- **H.R. 493: Sensible Enforcement of Cannabis Act.** This bipartisan bill, sponsored by Representative Lou Correa (D-CA) and six other House members, would essentially enshrine the now-rescinded “Cole Memorandum” into federal law. Among other things, it would prevent the U.S. attorney general from prosecuting “any conduct that concerns marijuana for medicinal or recreational use and is authorized by the laws of the State involved.” The bill also carves out eight exceptions for areas where the Justice Department could continue to enforce the federal cannabis prohibition. However, the need for this bill may be viewed as less pressing given Attorney General William Barr’s recent statements that he will not prosecute those who have relied on the Cole Memorandum.
- **S.420: Marijuana Revenue and Regulation Act.** This bill, one of three cannabis-related bills sponsored by Senator Ron Wyden (D-OR) in this Congressional session,

would establish a federal excise tax on legal cannabis sales, de-schedule the drug by removing it from the CSA, and create a permit system for businesses to engage in the cannabis industry. Another bill, [S.421](#), would reduce the gap between state and federal law with respect to cannabis by exempting cannabis from the CSA in states where it is legal and allowing access to the banking system for cannabis companies. Finally, S.422 (and the only Wyden-sponsored bill with co-sponsors) would allow cannabis-related companies to take business tax deductions. Representative Earl Blumenauer (D-OR) filed companion versions of these bills in the House: [H.R. 1120](#), [H.R. 1119](#), and [H.R. 1118](#), respectively.

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